No. 87-2068

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

ALABAMA POWER CO., *et al.*, UNITED MINE WORKERS OF AMERICA, AND ORMET CORPORATION,
*Petitioners,*
v.
LEE M. THOMAS, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR PETITIONERS ALABAMA POWER CO., *ET AL.*, UNITED MINE WORKERS OF AMERICA, AND ORMET CORPORATION

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## REPLY BRIEF FOR PETITIONERS ALABAMA POWER CO., *ET AL.*, UNITED MINE WORKERS OF AMERICA, AND ORMET CORPORATION

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### ARGUMENT

In this case, Petitioners seek review of the lower court's pronouncements on two fundamental principles of administrative law. The first concerns whether the notice requirement under § 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982), is satisfied, as to any potentially affected member of the public, when a final rule is an outgrowth of rulemaking comments urging an approach which was not even suggested in the rulemaking proposal. The second addresses the need under the APA for an administrative record in support of a regulation containing an "exceptions" procedure.

As to the first issue, the Federal Respondents argue that certiorari should not be granted because, in their

view, "Petitioners received the notice to which APA Section 4 entitled them." [1] As to the second issue, Federal Respondents argue that promulgation of a rule that contains an exceptions procedure allows reallocation of the burden of proof from the agency (to support its rule) to regulated parties (to show that a rule is not supported), and therefore that no technical record is needed to support such a regulation.[2] For the reasons discussed below, Federal Respondents' arguments in opposition to certiorari are without merit.

## I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS AND TO SETTLE THE PROPER SCOPE OF THE NOTICE REQUIREMENT IN § 4 OF THE APA.

Federal Respondents argue in opposition to certiorari that the Agency's rulemaking proposal "identified the NSPS limit as one of three emission rates that . . . would be applied to various affected sources," and that the Agency "eliminat[ed] the two alternatives to the NSPS limit" in response to rulemaking comments.[3] Federal Respondents contend on this basis that the final rule was a "logical outgrowth" of the rulemaking proposal.

That Federal Respondents persist in arguing that the proposal itself gave notice of three alternative rates is surprising since, in response to the identical assertion below, the D.C. Circuit found that "[n]othing in the [proposal] . . . suggested that EPA intended to adopt one of the three rates for *universal* use." [4] Rather, the

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[1] Brief for the Federal Respondents in Opposition at 16 (hereinafter "Fed. Resp. Brief ——").

[2] *Id.* at 19-20.

[3] *Id.* at 17-18.

[4] NRDC v. Thomas, 838 F.2d 1224, 1242 (D.C. Cir. 1988) (emphasis added), Appendix to Petition for Certiorari at 31a (hereinafter "App. ——").

court found that EPA's suggestion that it had proposed three alternative emission rates, any one of which could have been adopted separately and imposed on all sources (including sources to which that rate would otherwise be inapplicable), was "quite disingenuous." [5]

The preamble to the proposed rules merely identified the regulatory programs under which emission rates were established for existing and new sources,[6] and simply stated that EPA guidance would provide that the "applicable" emission rate would be used in fluid modeling—guidance that was consistent with past practice and that reflected pre-existing legal requirements.[7] By imposing NSPS on existing sources to which that rate is inapplicable, therefore, the final rule contains a requirement that is exactly opposite to the "applicable" emission rate approach described in the preamble to the proposal.[8] In

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[5] 838 F.2d at 1242, App. 31a.

[6] Petition for a Writ of Certiorari at 8 (hereinafter "Pet. ——"). New sources are subject to NSPS under § 111 of the Act, and existing sources are subject to state implementation plan (SIP) limits established under § 110 of the Act.

[7] *See* Pet. 7-8. There was no need to propose a rule requiring that a source use its "applicable" emission rate, because that "applicable" rate already applied without a new rule stating that fact. Thus, new sources would use an NSPS limit and existing sources would use a SIP limit in fluid modeling.

[8] Federal Respondents' attempt to imply that this case is analogous to Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 533 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982), is without merit. Fed. Resp. Brief 16. In that case, unlike here, the agency (the NRC) did propose distinct, mutually exclusive rules, only one of which was promulgated. The court therefore held that the NRC's proposal had provided adequate notice of the final rule under the APA.

More importantly, *Connecticut Light and Power* did not address the central issue presented here—whether rulemaking comments can provide the notice required under the APA. Significantly, EPA highlighted that case before the D.C. Circuit in this case, *see* Brief for Respondents at 39 n.25 (February 17, 1987), but the court did not rely upon or even cite that case. In short, that case has no bearing on this case.

these circumstances, Federal Respondents' attempt to characterize the final rule as a "logical outgrowth" of the proposal is simply without merit.[9]

Indeed, the first time that imposition of an inapplicable NSPS rate was even suggested to the Agency occurred over seven years after passage of § 123 at a public hearing held *after* the 1984 proposal was published.[10] In other words, the imposition of an inapplicable NSPS on existing sources was not an issue that was even presented to the Agency until after development of its proposed rules. Understandably then, this issue was not raised in the notice of proposed rulemaking.

Federal Respondents also suggest, as the lower court held, that the filing of two (out of over four hundred) rulemaking comments gave potentially regulated parties an opportunity to oppose the NSPS presumption rule.[11]

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[9] For these reasons, while the D.C. Circuit continues to pay lip service to the phrase "logical outgrowth of the proposal" in its opinions and, in fact, used that phrase in its opinion in this case, 838 F.2d at 1242, App. 32a, even a cursory analysis of the opinion reveals that the court's holding that notice was adequate was based not on such a finding (which would have been inconsistent with the finding that EPA's argument was "quite disingenuous"), but rather on the fact that rulemaking *comments* had urged a rule similar to the one promulgated.

[10] *See* Transcript of Public Hearing on EPA's Proposed Stack Height Regulations at 171, 191 (January 8, 1985) (statement of NRDC).

[11] The more detailed of these comments in fact suggested a much broader interpretation of the Act that could have required application of NSPS by all sources subject to § 123, even those that did not seek above-GEP formula credit. EPA does not dispute that this much broader approach was never proposed. The court found, however, that "[t]hough the target raised by this contention was broader than NSPS, it . . . gave industry critics an opportunity . . . to attack *any* form of control-first . . . . [T]here was a clearly foreseeable risk that EPA would reject the environmentalists' reading of the law but proceed to adopt control-first as a matter of choice." 838 F.2d at 1243, App. 33a (emphasis in original). For

The D.C. Circuit's use of isolated rulemaking comments as the basis for application of the "logical outgrowth" doctrine in this and other cases [12] represents a radical extension of that doctrine—an extension that is inconsistent with the law in other circuits.

Federal Respondents are simply wrong to suggest that the Fourth Circuit's decision in *Chocolate Manufacturers Association of United States v. Block*, 755 F.2d 1098 (4th Cir. 1985), does not conflict with the D.C. Circuit's decision in this case. In *Chocolate Mfrs. Ass'n*, the proposal included a pre-existing rule allowing use of flavored milk as part of school lunches, and the Department of Agriculture did not indicate that any consideration was being given to changing the rule. Nonetheless, in response to comments, the Department eliminated the rule allowing flavored milk. The Fourth Circuit held that rulemaking comments could not cure the notice defect in the proposal.

In this case, the court recognized that the proposal did not even suggest the "universal use" of NSPS, whereas the final rule required it. Nevertheless, the court, relying on the fact that two rulemaking comments suggested a rule different from the approach described in the proposal, held that, in light of these comments, all potential rulemaking participants (even those that, like Petitioners United Mine Workers of America (UMW) and Ormet, had not participated in the rulemaking) were not entitled to additional notice under the APA.[13]

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other members of the public that were not participating in the rulemaking because the proposal did not give notice of an NSPS requirement for fluid modeling ( as in the case of Petitioners United Mine Workers of America and Ormet), however, these rulemaking comments did not even form a basis for predicting what EPA might do in a final rule.

[12] *See* Pet. 18-20.

[13] *See id.* 11-12.

The instant case is therefore in direct conflict with *Chocolate Mfrs. Ass'n*—in both cases, neither "the history of the issue in the agency nor the preamble discussion furnished fair warning that the position eventually adopted in the final rule would even be considered, . . . and, indeed the final rule was exactly opposite of the original proposal . . . ." [14] Federal Respondents completely ignore the holding in *Chocolate Mfrs. Ass'n* that is significant in this case—that notice must come from a rulemaking proposal published by the agency, not from comments filed by rulemaking participants.

Finally, Federally Respondents ignore the broad policy implications of the D.C. Circuit's decision.[15] As described in the Petition, it is inconsistent with basic notions of due process to allow a federal agency to lull potentially interested parties into not filing comments and then later, without further public notice and comment, adopt a final rule reversing the course described in its proposal.[16]

As Chief Justice Rehnquist has observed, the issue of what notice is adequate when a final rule differs from a proposal is "a recurring one that will ultimately require interpretation of . . . [the APA] by this Court." [17]

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[14] Fed. Resp. Brief 18-19.

[15] *See* Pet. 20-23.

[16] Federal Respondents suggest half-heartedly that they did give certain rulemaking participants notice of the final rule two weeks before it was promulgated. Fed. Resp. Brief 18 n.11; *see* NRDC v. Thomas, 838 F.2d at 1244, App. 33a. Such belated notice is clearly inadequate. *See* Pet. 10 n.24. Moreover, that notice was not extended to all rulemaking participants or to other persons, such as Petitioner UMW, who had not participated in the rulemaking given the wording of the proposal.

[17] Eli Lilly & Co. v. Costle, 444 U.S. 1096, 1098 (1980) (dissenting from decision not to grant certiorari).

Given the confusion in the circuits as to the proper scope of the APA notice requirement and the broad policy implications of this issue for the proper functioning of the administrative process, the time for review by this Court has come.

## II. CERTIORARI SHOULD BE GRANTED TO SETTLE THAT THE TECHNICAL BASIS FOR A RULE CONTAINING AN EXCEPTIONS PROCEDURE MUST BE SUPPORTED BY AN ADEQUATE RECORD.

In opposing certiorari, Federal Respondents assert that Petitioners are wrong in suggesting "that the EPA made a factual finding that most sources can meet the NSPS." [18] Rather, according to Federal Respondents, "EPA merely 'ma[de] the presumption that this limit can be met by all sources.'" [19] Since the Agency presumed that the key fact underlying the final rule was true (i.e., that sources subject to the rule could meet NSPS levels of control), Federal Respondents contend that "there was no factual finding that required record support." [20] Thus, Federal Respondents' contention is that a rule containing an "exceptions" procedure can be based on "presumed" facts that have no demonstrated relationship to reality.

In establishing a legislative rule, an agency is not permitted under the APA to "presume" the crucial fact underlying that rule. Rather, an agency is required to find that fact (in this case, that sources subject to the rule could typically meet NSPS) and support it in the record.[21]

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[18] Fed. Resp. Brief 19.

[19] *Id.*

[20] *Id.*

[21] *See* Pet. 24-25 and note 64.

Addition of an "exceptions" procedure to a rule is no basis for ignoring this principle.

Federal Respondents are wrong to argue that the D.C. Circuit's decision is not in conflict with the Fourth Circuit's decision in *E.I. du Pont de Nemours & Co. v. Train*.[22] In that case, the Fourth Circuit clearly applied the long-standing administrative law principle that "[t]he grounds upon which the agency acted must be clearly disclosed in, *and sustained by*, the record."[23] The significance of the Fourth Circuit's decision is that this principle was applied *even though* the regulations (establishing effluent limitations) contained an "exceptions" procedure.[24] By contrast, in this case, the D.C. Circuit found no need for a record in support of an analogous rule establishing an applicable emission rate that is subject to an "exceptions" procedure.

Federal Respondents are also wrong to suggest that the need for record support for a rule may be disregarded where there is a general congressional policy suggesting caution in case-by-case implementation of the rule.[25] It is true under administrative law principles that a regulated party seeking an administrative order has the burden of proof in demonstrating that the regulatory requirements necessary to obtain that order are met. Under the APA, however, the proponent of a rule (the agency)

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[22] 541 F.2d 1018, 1028 (4th Cir. 1976), *aff'd in part, rev'd in part*, 430 U.S. 112 (1977).

[23] *Id.* (emphasis added).

[24] Without knowing the facts underlying a rule containing an exceptions procedures, there is no basis for knowing which facts would justify an exception to the rule. In *du Pont*, an exception to the effluent limits in the rules could be granted on a showing of the presence of "fundamentally different" factors. The "exception" provision in the rules referenced a detailed technical support document that would disclose whether the facts in an individual case were different from those considered by the agency in developing the generic effluent limit.

[25] *See* Fed. Resp. Brief 19.

has burden of proof in rulemaking proceedings.[26] This burden does not shift simply because the regulation contains an "exceptions" procedure.[27]

Finally, Federal Respondents' view of the law would result in a fundamental reallocation of regulatory burdens among agencies and private parties, inconsistent with the APA. Under this view, an agency could promulgate regulations based upon wholly unsupported "presumptions" of facts so long as an "exceptions" procedure or "safety valve" was included in the rule.

Under this principle, EPA could adopt control technology rules under the Clean Air Act, Clean Water Act, and similar statutes by presuming, without any technical support, that certain control technologies are economically and technologically feasible.[28] The Secretary of Labor, under the Occupational Safety and Health Act, could adopt workplace standards by presuming, without record support, that the standards are economically and technologically feasible.[29] In other words, under this principle,

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[26] *See* Industrial Union Dep't v. American Petroleum Institute, 448 U.S. 607, 653 (1980); *see also* 5 U.S.C. § 706 (providing for review of agency decisions based on the agency's record).

[27] In adopting another rule that also applies to parties seeking above-formula stack height credit, therefore, EPA *did* assemble a technical record to support the rule, rather than adopt a stringent rule, without technical support, that a regulated party could attempt to rebut. *See* 49 Fed. Reg. 44883 (1984), App. 157a (the "nearby terrain" rule). Thus, EPA did not allege that § 123 congressional policy allowed the Agency to dispense with normal administrative law record requirements, except with respect to a rule that it developed at the very end of a lengthy rulemaking process without notice and comment.

[28] *Cf.* National Lime Ass'n v. EPA, 627 F.2d 416 (D.C. Cir. 1980).

[29] *Cf.* American Textile Manufacturers Institute v. Donovan, 452 U.S. 490 (1981).

as long as a rule contains an "exceptions" procedure, federal rulemakers are free to bypass the facts by presuming them. The opportunities for such "streamlined" rulemaking decisions are limitless and would lead to a total loss of agency accountability in federal rulemakings.

This is not the law.[30] Certiorari should be granted in this case to make clear that including an "exceptions" procedure in a regulation does not eliminate an agency's duty under the APA to support the factual basis for the rule in the record.

## CONCLUSION

For the foregoing reasons, and those discussed in the Petition for Certiorari, this Court should grant certiorari.

Respectfully submitted,

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[30] *See* Pet. 25-27.